
Wrongful Incarceration

Policy Options for Legislative Consideration

Wrongful Conviction

Scope of the Issue

For those people who are actually innocent of a crime for which they have been incarcerated, there are very few if any, legal remedies available, due to the doctrines of sovereign immunity,¹ absolute immunity,² and qualified immunity.³ Thus there are individuals who have been incarcerated for crimes that they did not commit, with no avenue for compensation. In recent history, four people been exonerated based on DNA.⁴ In the past ten years, five claimants have petitioned the Legislature for compensation for wrongful incarceration: Freddie Lee Pitts and Wilbert Lee,⁵ Jesse Hill,⁶ Frank Lee Smith,⁷ and Wilton Dedge.⁸

¹ Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. Article X, section 13 of the State Constitution allows the state to waive its immunity through an enactment of general law. In 1973, the Legislature enacted s. 768.28, F.S., which allows individuals to sue the state government, subdivisions of the state, and municipalities under circumstances where a private person would be liable to the claimant.

² Judges and prosecutors are afforded absolute immunity. *Berry v. State*, 400 So.2d 80 (Fla. 4th DCA 1981), rev. denied, 411 So.2d 380 (Fla. 1981).

³ Qualified immunity protects public officials from civil damages to the extent that their conduct does not violate established statutory or constitutional rights of which a reasonable person would have known. To establish qualified immunity, the official had to be acting within the scope of his/her discretionary authority and there had to be a clear violation of established rights. *Gentile v. Bauder*, 718 So.2d 781 (Fla. 1998).

⁴ Exonerations in the United States 1989-2003, 95 J.Crim.L. & Criminology 523 (Winter 2005). Those exonerated based on DNA include Jerry Frank Townsend, Frank Lee Smith, Wilton Dedge, and Luis Diaz.

⁵ The first of 22 claims bills for Pitts and Lee was filed in 1977. HB 3035 passed in 1998, and directed the Division of Administrative Hearings to determine whether a cause for equitable relief existed, and if so, to award the claimants \$500,000 each plus attorney's fees and costs not to exceed \$250,000. The claimants were ultimately awarded the maximum allowable. The two claimants had been convicted of murder and sentenced to death for the murders of two Port St. Joe men in 1963. These convictions were ultimately overturned, partly on the grounds that there was a knowing or negligent withholding of evidence by the state, and the claimants were again convicted and sentenced to death in a new trial. In 1973, the United States Supreme Court determined that the death penalty was unconstitutional, and overturned Pitts' and Lee's death sentence at which time they began serving a sentence of life imprisonment. In 1975, after serving 12 years for murder, Governor Askew and the Cabinet granted a pardon, concluding that "substantial doubt exists as to the guilt of Pitts and Lee." Division of Administrative Hearings, Final Report in Case No 98-2005, June 30, 1998.

⁶ Jesse Hill was arrested for violating his probation for failure to report to his probation officer. Five days after his arrest it was discovered that his original probation did not require him to report, so he was released. During his incarceration a pre-existing injury to his spine was aggravated, and he sued for false imprisonment. The jury determined that the Department of Corrections was liable, and assigned 75% of the liability to the Department and 25% to Hill; damages were assessed at \$750,000. Due to legal arguments regarding the assignment of comparative fault in intentional tort cases, the claim bill was filed twice: in 1989 and again in 1996. Ultimately SB 1218 (1996) passed and awarded Jesse Hill \$250,000.

⁷ Claim bills for \$3.5 million were filed in 2001 and 2002: SB 292/HB 1483 (2001 – both bills died in committee) and SB 80 (2002- withdrawn by sponsor). Frank Lee Smith spent 14 years on death row and died there, of cancer. Based on DNA evidence, he was exonerated of the 1985 rape and murder of an eight year-old girl, eleven months after his death. DNA also identified the true perpetrator, Eddie Lee Mosley, also implicated in the case of Jerry Frank Townsend (A mentally retarded man convicted of six murders and one rape; DNA exonerated him and implicated Eddie Lee Mosley. Townsend has not filed a claim bill, but is proceeding against the Broward County Sheriff's Office and the City of Miami in court.)

⁸ HB 865 was filed in 2005, asking for the relief of Wilton Dedge. The bill died in committee. Mr. Dedge served 22 years in prison for sexual battery, aggravated battery, and burglary. Based on DNA, he was exonerated. A Petition for Expungement of Record, Factual Findings and other Relief Including Actions for Declaratory Relief and Damages and Equitable Relief under Extraordinary Writ Authority was filed with the Eighteenth Judicial Circuit Court in and for Brevard County, Florida in June, 2005, case no's. 82-135-CF-A and 05-20-05-CA-007583 and subsequently transferred to the Second Judicial Circuit. The petition was dismissed by the court on August 29, 2005.

Past Legislative Attempts to Compensate the Wrongfully Convicted

In 2005, both the House and the Senate filed bills to create a procedure whereby the wrongfully incarcerated could be compensated.⁹ Both chambers agreed that in order to be eligible for compensation there must have been a finding by a court, upon clear and convincing evidence, that the person did not commit the offense that resulted in the felony conviction and incarceration. Both chambers also agreed that punitive damages were not appropriate for compensation. The differences in the two pieces of legislation can be summed up as follows:

- ☐ Who should be responsible for determining compensation for the wrongfully incarcerated?¹⁰
- ☐ Should sovereign immunity be waived in order to compensate the wrongfully incarcerated?¹¹

See Appendix A for a chart of unresolved issues regarding the 2005 legislation.

Other States

Twenty one states and the Federal Government provide some sort of compensation to the wrongfully incarcerated; thirty states don't provide any mechanism for compensation. The most recent state to pass wrongful incarceration legislation is Louisiana, which provides compensation of \$15,000 per year incarcerated, not to exceed a maximum of \$150,000; funding comes from the Innocence Compensation Fund, which was created specifically for the administration of awards under the new law.¹² Louisiana also provides for job-skills training for one year, medical and counseling services for three years, and tuition expenses.¹³ The other 20 states provide monetary compensation for the wrongfully convicted at a wide range of levels and formulas, ranging from a low of \$20,000¹⁴ to a high of \$1 million.¹⁵ There are states that award compensation for each day of incarceration;¹⁶ New Jersey allows twice the amount of the claimant's income in the year prior to incarceration or \$20,000 per year of incarceration (whichever is greater)¹⁷; and Virginia ties the award to 90% of the Virginia per capita personal income as reported by the Economic Analysis of the U.S. Department of Commerce, for up to 20 years.¹⁸

Similarly, the states require different governmental bodies to determine compensation. Ten states and the Federal Government require compensation decisions be made by the judicial branch,¹⁹ as does the new Louisiana law.²⁰ The Legislatures in several states make the

⁹ HCR 1879 and CS/CS/SB 1964 (second engrossed).

¹⁰ HCR 1879 allowed the Legislature to retain control over an appropriation for wrongful incarceration through a joint claim process; SB 1964 required the Attorney General to make an offer of compensation, which if rejected, entitled the claimant to file suit.

¹¹ HCR 1879 specifically provided that sovereign immunity would not be waived. SB 1964 allowed the court to determine compensation and require the government to pay such amount up to \$5 million.

¹² Louisiana Act 486 (2005), signed by the Governor on 7/12/05 and effective on 9/1/05.

¹³ Id.

¹⁴ New Hampshire (NH Stat. s. 541-B:14).

¹⁵ Tennessee (Tenn. Code s. 9-8-108).

¹⁶ California (\$100 per day); Iowa (\$50 per day, up to \$25,000 per year).

¹⁷ NJ Stat. 52:4C-1 to 4C-6.

¹⁸ Virginia Code ss. 8.01-195.10 & 19.2-327.1.

¹⁹ Washington D.C., Illinois, Iowa, Maine, Massachusetts, New Jersey, New York, Ohio, Oklahoma, and West Virginia. Note that in the Federal Government and in four of these states, Illinois, New York, Ohio, and West Virginia, the decision is made by a court of claims, which is typically an administrative court.

appropriation,²¹ some after having received a recommendation from a separate body.²² Lastly, there are states that have an independent board make the compensation decision.²³

Of the states that do provide compensation to the wrongfully convicted, experience dictates that the number of people actually compensated is relatively small. Similarly, West Virginia has paid only two claims between 1987 and 1999.²⁵ Information provided by the State of New York (which has no sovereign immunity, and is considered to have a liberal compensation statute), shows that between 1985 and February of 2005, there have been 12 successful claims for unjust conviction and imprisonment, which claimants have been awarded a total of \$5,484,218.43. An additional twenty claims have been settled in New York, totaling \$10,689,250. The largest individual claim was a settlement of \$3.3 million for a man that was wrongfully convicted of murder and spent 14 years in prison.²⁶

See Appendix B for a State by State Analysis of Compensation of the Wrongfully Incarcerated.

Should Sovereign Immunity be Waived?

General Discussion of Sovereign Immunity

Sovereign immunity is a doctrine which prohibits suits against the government without the government's consent. The principle of sovereign immunity was inherited from the notions of sovereignty in practice at the time of the separation of the American states from Great Britain, wherein the king and his treasury were immune from suits by his subjects in his own courts. The doctrine of sovereign immunity is still recognized in England, as "crown immunity."²⁷

The Florida Constitution addresses sovereign immunity in Article X, section 13. This provision allows the state to waive its immunity through an enactment of general law. Sovereign immunity extends to all subdivisions of the state, including counties, municipalities, and school boards. In 1973, the Florida Legislature enacted s. 768.28, F.S. This section allows individuals to sue state government, subdivisions of the state, and municipalities. According to subsection (1), individuals may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of the state..."

²⁰ Louisiana Act 486 (2005), provides that all applications be filed in the Nineteenth Judicial Circuit Court in Baton Rouge.

²¹ Montana and Virginia.

²² Alabama requires verification by the Division of Risk Management, and recommendation by the committee on Compensation for Wrongful Incarceration; California requires a recommendation from the State Board of Control.

²³ Maryland Board of Public Works (comprised of the Governor, the Comptroller, and the Treasurer); New Hampshire Board of Claims (comprised of two appointees of the Governor; one House member; one Senate member; and a Chair appointed by the Chief Justice of the Supreme Court); North Carolina Industrial Commission (administers the Worker's Comp. Act under the Department of Commerce); Tennessee Board of Claims (Commission within the Treasurer's office); and Wisconsin Claims Board (aligned with the Department of Administration and comprised of a representative of the Governor, a representative of the Secretary of Administration, a representative of the Department of Justice, and chairs of both House and Senate finance committees).

²⁵ Id at 49.

²⁶ Anthony Faison was convicted of murder in 1987 based on eyewitness testimony that was ultimately retracted. <http://www.justicedenied.org/freeat.htm>. (Last visited 8/1/05.)

²⁷ Note that sovereign immunity is distinguishable from Eleventh Amendment immunity, which provides that federal jurisdiction does not extend to any suit in law or equity, commenced or prosecuted against one state by citizens of another state or a foreign state. The Eleventh Amendment states "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Notwithstanding the enactment of s. 768.28, F.S., certain remnants of sovereign immunity remain in effect:

- Monetary limits on recovery: Section 768.28, F.S., imposes a \$100,000 limit on the government's liability to a single person. Furthermore, it imposes a \$200,000 limit on the government's liability for claims arising out of a single incident. These limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap, but require Legislative approval for awards in excess of the cap.²⁸
- Exceptions to the state's immunity waiver for discretionary functions²⁹ and for the public duty doctrine.³⁰

Though the doctrine of sovereign immunity applies to the judicial branch, which includes both judges and prosecutors, the courts have found that the state's waiver of immunity under s. 768.28, F.S., did not abrogate the common law principle of judicial immunity. Thus, judges are afforded absolute immunity unless the judge has clearly acted in the absence of jurisdiction.³¹ Similarly, State Attorneys are considered part of the judicial branch of government, and are absolutely immune from liability for their conduct in prosecuting the state's case.³² Thus, for the most part, wrongful incarceration is not covered by the statutory waiver of immunity found in section 768.28, Florida Statutes. Conversely, judicial immunity does not extend to public defenders, as the Florida Supreme Court has found that the public defender's role is as advocate rather than impartial administrator of justice.³³

The doctrine of sovereign immunity clearly provides protection for the government against tort liability. As a matter of equity the Legislature has the authority to compensate individuals who have been injured by governmental negligence, without waiving sovereign immunity, through the claim bill process.³⁴

Notable Exceptions to the Doctrine of Sovereign Immunity

There are four notable exceptions to the doctrine of sovereign immunity. Sovereign immunity does not protect the state for the following actions:

1. Taking of property. Article X, section 6 of the Florida Constitution provides that no private property may be taken except for a public purpose and with full compensation therefor paid to each owner. Similarly, the Takings Clause of the Fifth Amendment to the U.S. Constitution prohibits taking private property for public use without just compensation. The Florida Supreme Court has held that the state's immunity from suit does not relieve it from liability for any illegal act depriving a citizen of his property, and will not be permitted as a plea to defeat recovery of land or other property wrongfully taken by the state through its officers

²⁸ Section 768.28(5), F.S. Note that a governmental entity may pay judgments or settlements up to the limits of insurance coverage without legislative approval. Government entities are not required to purchase insurance.

²⁹ Where the state is involved in a discretionary or planning-level function, courts have refused to find liability. The courts use a four-part test to determine whether a particular activity should be classified as discretionary. *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988).

³⁰ Where the government owes a general duty to all citizens, but no particular duty to the injured party, sovereign immunity remains in effect. *Everton v. Willard*, 468 So.2d 936 (Fla. 1985).

³¹ *Berry v. State*, 400 So.2d 80 (Fla. 4th DCA 1981), rev. den., 411 So.2d 380 (Fla. 1981).

³² *Hansen v. State*, 503 So.2d 1324 (Fla. 1st DCA 1987).

³³ *Shreiber v. Rowe*, 814 So.2d 396 (Fla. 2002).

³⁴ See s. 768.28(5), F.S., Rule 5.6 of the Rules of the Florida House of Representatives (2004-2006), and Rule 4.81 of the Rules of the Florida Senate (2004-2006).

and held in the name of the state.³⁵ Similarly, the state cannot assert sovereign immunity as a defense in an inverse condemnation case.³⁶

2. Civil Rights Actions.

- a. Federal: Section 1983 of the U.S. Code provides in relevant part that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The United States Supreme Court has stated that 'Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 cannot be immunized by state law.'³⁷ However, the State is protected by its Eleventh Amendment immunity, as the state is not a 'person' within the meaning of section 1983,³⁸ though an official acting under color of law who has deprived a person of a federal right or privilege can be held personally liable under section 1983.³⁹ The State Risk Management Trust Fund is authorized to provide insurance for federal civil rights actions under 42 U.S.C. section 1983.⁴⁰ The State Division of Risk Management reports that in fiscal year 2004, 342 federal civil rights violations claims were reported, and that in 2003-2004, \$11,094,595 was paid for federal civil rights and employment discrimination claims.⁴¹ Political subdivisions excluded from participation in the State Risk Management Trust Fund are authorized to expend available funds to pay any final judgment arising from a violation of civil rights secured under the Federal Constitution or laws.⁴²
- b. State law: The Florida Civil Rights Act of 1992 provides a civil cause of action for any violation of a state law making unlawful discrimination because of race, color, religion, gender, national origin, age, handicap, or marital status in the areas of education, employment, housing, or public accommodations.⁴³ Florida courts have held that sovereign immunity is waived in actions brought under the Florida Civil Rights Act, though the statutory caps in s. 768.28(5) apply.⁴⁴

3. Breach of Contract. Sovereign immunity does not protect governmental entities from actions based on breach of contract. The Florida Supreme Court has

³⁵ *State Road Department v. Tharp*, 1 So.2d 868 (Fla. 1941). As to the doctrine of sovereign immunity, the court stated that, "as to tort actions, the rule is universal and unqualified unless relaxed by the State, but in other fields, it is not universal in application and cannot be said to cover the field like the 'dew covers Dixie'." *id.* at 869.

³⁶ *Pinellas County v. Brown*, 420 So.2d 308 (Fla. 2nd DCA 1982).

³⁷ *Howlett by and Through Howlett v. Rose*, 496 U.S. 356 (1990), citing *Martinez v. California*, 444 U.S. 277, 284 (1980).

³⁸ *Howlett v. Rose*, at 363. However, divisions of the State, such as municipalities, school boards, and counties, are included within the definition of 'persons', and thus may be liable for damages under s. 1983. *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

³⁹ *Scheuer v. Rhodes*, 416 U.S. 232 (1973).

⁴⁰ Section 284.30, F.S.

⁴¹ The State of Florida Division of Risk Management Annual Report, 2003-2004 Fiscal Year, published January 1, 2005, at p. 18. Note that the total amount paid in 2003-2004 was for claims that occurred in FY 1997-1998.

⁴² Sections 111.07 and 111.071, F.S.

⁴³ Section 760.07, F.S.

⁴⁴ Section 760.11(5), F.S., *Klonis v. State Department of Revenue*, 766 So.2d 1186 (Fla. 1st DCA 2000), and *Jones v. Brummer*, 766 So.2d 1107 (Fla. 3rd DCA 2000).

extrapolated that in instances where the Legislature has authorized governmental entities to enter into contracts, the Legislature intended that such contracts be mutually binding; otherwise the authorization to enter into contracts would be meaningless.⁴⁵

4. Counterclaims Against the State. Florida law provides that when the state or its subdivisions initiates a suit for damages in tort, the state voluntarily waives its sovereign immunity to the extent of allowing the defendant to counterclaim for damages resulting from the same circumstances or occurrence.⁴⁶

It is not uncommon for tort plaintiffs to join one of above-mentioned claims with their tort claim, in order to get around the \$100,000/200,000 cap on tort liability.

Policy considerations regarding waiving sovereign immunity

There are several policy considerations that justify the doctrine of sovereign immunity:

- ☐ Sovereign immunity protects the public treasury from excessive encroachments;
- ☐ Sovereign immunity prevents the disruption of the orderly administration of government by excessive litigation by its citizens;
- ☐ Sovereign immunity promotes flexibility and discretion within governmental decision making; and
- ☐ Sovereign immunity protects separation of powers by prohibiting the judicial branch from interfering with the discretionary functions of the other two branches absent a violation of a statutory or constitutional right.⁴⁷

However, the doctrine of sovereign immunity has long been under attack. The chief criticisms of the doctrine of sovereign immunity include the following policy arguments:

- ☐ Sovereign immunity leaves injured plaintiffs without a legal remedy;
- ☐ Sovereign immunity protects the tortious conduct of government employees;
- ☐ Sovereign immunity prevents the public from making informed decisions about the conduct and efficiency of its government by bringing wrongful conduct to public attention.⁴⁸

⁴⁵ Pan-Am Tobacco Corp. v. State Department of Corrections, 471 So.2d 4 (Fla. 1984), rehearing denied (July 1, 1985).

⁴⁶ Section 768.14, F.S.

⁴⁷ Tort Suits Against Governmental Entities in Florida, Gerald T. Wetherington and Donald Pollack, 44 Florida Law Review 1 (January 1992), p. 8.

⁴⁸ Id at p. 28.

Which Branch of the Government Should be Tasked with Compensating the Wrongfully Incarcerated?

Several entities might be considered for tasking with the compensation of the wrongfully incarcerated. The following chart sets out some of the possibilities, along with policy considerations for each. Keep in mind that there are two decisions to be made: whether the person is actually innocent and thus eligible for compensation, and if so, how much is appropriate to compensate said person. A model may be developed that uses a certain organization for the innocence decision, and another organization for the compensation component.

Organizations that might be tasked with compensating the wrongfully incarcerated		
Entity	Policy Considerations in Favor	Policy Considerations Opposed
Legislature	Retain Legislative control of appropriations consistent with constitution.	Similar to the current claim bill process, which is perceived by some as too political.
Courts	Primary function of the courts is to determine liability and compensation.	Loss of legislative control; dilution of sovereign immunity in ordering compensation; allowing court to make appropriation could raise constitutional separation of powers issue.
Attorney General's Office	As Chief Legal Officer of the state and responsible for the Department of Legal Affairs, the Attorney General appears to be equipped to make determinations about compensating the wrongfully incarcerated.	The Attorney General typically defends the Department of Corrections in suits brought by prisoners claiming wrongful incarceration; thus there may be a perceived conflict of interest.
The Division of Administrative Hearings (DOAH), within the Department of Management Services	DOAH is tasked with making findings of fact and conclusions of law regarding administrative conflicts primarily hearing challenges to agency rules. DOAH also arbitrates medical malpractice claims pursuant to s. 766.207, F.S.	Query whether it is appropriate for an executive branch agency to make the decision of a person's innocence. May be appropriate to make recommendation regarding compensation, but not innocence.
The Clemency Board within the Parole Commission	The Board has a clear process for administering requests for clemency and pardons.	The purpose of clemency and the pardon process is to forgive a person for their crime; not to compensate for a crime that was not committed by the claimant. The Board does not have the expertise to determine actual innocence nor compensation. Because the Board is comprised of the Governor and Cabinet, it may be perceived as political.

The Division of Risk Management within the Office of the Chief Financial Officer	The Division already handles both tort and civil rights lawsuits against the government, and has statutory authority to pay claims. The Division has expertise in calculating damages.	The Division does not have the expertise to determine actual innocence. The Division does not have the expertise to award holistic benefits.
The Justice Administrative Commission (JAC)	The JAC is comprised of a Board made up of two state attorneys and two public defenders. The JAC is responsible for paying the due process and other administrative costs of the court system.	The JAC does not have the expertise to determine actual innocence nor compensation. There may be a real or perceived conflict of interest with the claimant and the Board.
An independent Board	Allows objective review of claims.	Creates more government; the membership, amount of authority and oversight required may dilute the independence of any such board.

What Guidelines should be used in Determining Appropriate Compensation?

Separation of Powers and Unlawful Delegation

Article II, Section 3 of the Florida Constitution provides that, “No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” The separation of powers doctrine prevents the Legislature from delegating its constitutional duties.⁴⁹ In reviewing the constitutionality of legislative policy making, the Florida Supreme Court has acknowledged that “where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the doctrine.”⁵⁰ However, the Court warned, “when legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.”⁵¹ Administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.⁵² Thus, it is important to ask several preliminary questions in developing guidelines that meet constitutional requirements:

1. Should the task be delegated at all, or should the Legislature be tasked with compensating the wrongfully incarcerated? If the Legislature chooses to take on the responsibility, the Legislature is not bound by guidelines, though it might find such guidelines helpful. If any other entity is tasked with the responsibility, guidelines should be provided. The following list, though not exhaustive, provides insight into the types of issues that would need to be addressed should the determination be made outside the Legislature (and which the Legislature may want to address statutorily if the determination is made within the Legislature):

⁴⁹ Florida State Board of Architecture v. Wasserman, 377 So.2d 653 (Fla. 1979).

⁵⁰ Askew v. Cross Key Waterways, 372 So.2d 913, 921 (Fla. 1978).

⁵¹ Id at 918-919.

⁵² Id at 925.

- How is eligibility determined?
 - Is the person entitled to any kind of due process protections?
 - Should the applicability process be time limited?
 - Should the applicant have to comply with any other conditions precedent?
 - How is compensation determined?
 - What damages qualify for compensation?
 - Should anyone other than the person wrongfully incarcerated be entitled to compensation? (for example, spouses, children, parents)?
2. Should the determination of actual innocence be a process newly created by statute, or do existing laws and court rules allow the courts to make such a decision?
- Note that in the Dedge case, the 18th Circuit Court ordered that all charges against Dedge be dismissed and that he be discharged from custody based on 3.850 motions made by both the defendant (Dedge) and the State.⁵³ This was done under the court's existing authority.
 - Note also that in Jerry Frank Townsend's case, the 17th Circuit Court vacated and set aside judgment and sentence based on the State's motion. This was also done under the court's existing authority.
 - The creation of a new statutory process for the determination of actual innocence might also create new entitlements to due process protections.
 - Query whether any new process should also include a disincentive for prisoners who know that they are guilty, but use the system to test their DNA anyway.
3. Should the determination of compensation be viewed as a moral obligation in which the Legislature decides that it (or another entity) make an appropriation, or is it a legal obligation in which either the Legislature or the judiciary make decisions based on traditional damages theories?
- If the Legislature decides that compensating the wrongfully incarcerated is a legal obligation entitling such person to non-quantifiable damages, then it would appear that the proper body to determine compensation

⁵³ Rule 3.850 of the Florida Rules of Criminal Procedure allows a person to claim that judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that the sentence was in excess of the maximum authorized by law, that the plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack. Such prisoner may move that the sentence be vacated, set aside, or corrected. It is notable, however, that the Fifth District Court of Appeal earlier affirmed the denial of a previous 3.850 motion made by Dedge, as being time barred. *Dedge v. State*, 832 So.2d 835 (Fla. 5th DCA 2002). It would appear that Dedge's release based on the instant 3.850 motion was granted based on the joint nature of the motion, rather than a strict application of the rule.

would be either the Legislature or the courts (as opposed to an independent board or executive body).⁵⁴

Theories of Compensation

Holistic Compensation: It has been argued that a model system of compensation would include not only financial compensation, but also holistic benefits that address the financial, educational, and health problems inherent in spending years in prison.⁵⁵ In Florida, 4.6% of the inmates enrolled in educational programs received their GED, and 16% of the inmates identified as needing substance abuse treatment participated in institutional-based substance abuse programs.⁵⁶ The Department of Corrections reports that in fiscal year 2003-2004, 87% of the inmates released completed the 100-hour transition course designed to equip them with the skills needed to survive in the work world.⁵⁷ Even so, it may be assumed that the wrongfully incarcerated are in need of more than financial assistance, and may in fact, not be able to responsibly manage a large sum of money.

In recognition of the need for holistic benefits, the 2005 legislation passed by the House included provision for the following:

- ❑ **Health Care** – Federal data suggest that prisoners have significantly more physical and mental health problems than the general population, due to life styles that include drug use, poverty, and high stress levels.⁵⁸ In fact, the health of the average 50-year-old approximates that of a 60 year-old in the free community.⁵⁹ Further, the HIV infection rate is 6 times higher for prison inmates than for the general U.S. population.⁶⁰ Legislation passed by the House in 2005 allowed the Legislature to direct the appropriate state agency to purchase a comprehensive health care plan, including dental and mental health coverage.⁶¹ Note that Louisiana just passed a similar law which allows payment for appropriate medically necessary medical and counseling services for three years, but only if such services are not available from a public facility that is reasonably accessible to the applicant.⁶²
- ❑ **Educational Assistance** – In Florida, 25% of the inmates housed in the Department of Corrections were enrolled in education programs in fiscal year 2003-2004.⁶³ Legislation passed by the House in 2005 allowed the Legislature to waive tuition and fees for up to a total of 4 years of instruction at any career center, community college, or state university.⁶⁴ Note that the recently passed Louisiana law provides, among other things, that a wrongfully convicted person

⁵⁴ The Florida Supreme Court has held that a county's attempt to grant non-quantifiable damages fell clearly within the realm of judicial powers and could not be delegated to the county's fair housing and employment appeals board. However, the Court held that the board could award back pay, as back pay is quantifiable. *Laborers' International Union of North America 487 v. Burroughs*, 541 So.2d 1162 (Fla. 1989).

⁵⁵ Shawn Armbrust, "When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted", 41 Am. Crim. L. Rev. 157, Winter 2004, p. 5.

⁵⁶ Office of Program Policy Analysis and Government Accountability (OPPAGA), report on Department of Corrections Inmate Programs, last updated 10/13/04. Data is for fiscal year 2003-2004.

⁵⁷ Id.

⁵⁸ Joan Petersilia, Ph.D., "When Prisoners Return to Communities: Political, Economic, and Social Consequences", 65-JUN Fed. Probation 3, June 2001, p. 5.

⁵⁹ Id.

⁶⁰ Id. In 1996, 2.3% of all state and federal prisoners were known to be infected with HIV.

⁶¹ HCR 1879 (2005).

⁶² Louisiana Act 486 (2005).

⁶³ See OPPAGA report on Department of Corrections Inmate Programs.

⁶⁴ HCR 1879 (2005).

who is factually innocent may receive expenses for tuition and fees at any community college or unit of the public university system in Louisiana.⁶⁵

- ❑ Job preference – A lack of training and job experience, as well as the public's unwillingness to hire ex-inmates⁶⁶ may make the prospect of finding a job after spending time in prison a daunting task. Legislation passed by the House in 2005 allowed the Legislature to award first preference in employment by the state and its political subdivisions, as long as the inmate is otherwise eligible for employment with the hiring agency.⁶⁷
- ❑ Waiver of fees – Advocates for the wrongfully incarcerated have expressed concern that the person's arrest and court records may be held against them in employment and other aspects of living a free life. Florida law provides for the administrative expunction of any nonjudicial arrest records made contrary to law or mistake.⁶⁸ The expunction of judicial records, however, is a judicial function acknowledged by Florida statute.⁶⁹ Section 943.0585, F.S., provides that the courts of this state have jurisdiction over their own procedures, including the expunction of judicial records containing criminal history information. Thus it would appear that the Legislature is restricted by the separation of powers doctrine from actually ordering the expunction.⁷⁰ In an attempt to balance both the needs of the wrongfully incarcerated with the requirements of the constitution, the House in 2005 passed legislation that would waive any statutory fees required to expunge any arrest or court records, and waive any fees for copying costs or other costs of obtaining public records in furtherance of such expunction.⁷¹

Compensation for time spent incarcerated: If the Legislature views the compensation of the wrongfully incarcerated to be a moral obligation satisfied by an appropriation (and perhaps other holistic benefits), then it may make sense to approach the determination of the compensation amount in a formulaic manner. The following are several examples used by other states:

- ❑ A legislatively specified amount per year of incarceration (with or without a cap);⁷²
- ❑ A legislatively specified amount per day of incarceration (with or without a cap);⁷³
- ❑ A sliding scale based on time incarcerated;⁷⁴
- ❑ A flat cap;⁷⁵

⁶⁵ Louisiana Act 486 (2005).

⁶⁶ A survey in 5 major U.S. cities found that 65% of all employers said that they would not knowingly hire ex-offenders regardless of the offense. See Petersilia, "When Prisoners Return to Communities..." at p. 4, citing What employers want: Job prospects for less-educated workers, by H. Holzer, 1996.

⁶⁷ HCR 1879 (2005).

⁶⁸ Section 943.0581, F.S.

⁶⁹ Section 943.0585, F.S.

⁷⁰ The courts maintain sole discretion to determine whether, and how, to seal or expunge court records without interference from legislative requirements. *State v. D.H.W.*, 686 So.2d 1331, 1334 (Fla. 1996).

⁷¹ HCR 1879 (2005).

⁷² The Federal government provides \$100,000 per year for death sentences and \$50,000 per year for all other sentences; Alabama provides a minimum of \$50,000 per year of incarceration; North Carolina provides \$10,000 per year of incarceration, with a max of \$150,000; Ohio provides \$25,000 per year and lost wages; Texas provides \$25,000 per year, with a max of \$500,000; Wisconsin provides \$5,000 per year, with a max of \$25,000.

⁷³ California provides \$100 per day of incarceration; Iowa provides \$50 per day and lost wages.

⁷⁴ Illinois provides \$15,000 max for less than 5 years of incarceration; \$30,000 max for 5-14 years of incarceration, and \$ 35,000 max for more than 14 years incarcerated with a COLA increase for each year since 1945.

- ☐ An amount tied to an independent economic figure.⁷⁶

Actual Damages: Should the Legislature choose to view the compensation of the wrongfully incarcerated as a legal obligation, it may want to allow compensation for actual damages. “Actual damages” are also known as “compensatory damages” and are intended to make the injured party whole.⁷⁷ The following types of actual damages may be relevant to a legislative consideration of making the wrongfully incarcerated whole:

- ☐ Past medical expenses;
- ☐ Future medical expenses;
- ☐ Past pain and suffering;
- ☐ Future pain and suffering;
- ☐ Past lost wages;
- ☐ Future lost wages and lost earnings capacity;
- ☐ Lost savings and interest;
- ☐ Loss of assets due to foreclosure, repossession or other methods of recovery by a creditor.

The Legislature should also consider whether to allow a claim by persons other than the actual wrongfully incarcerated. For example, should a spouse, children, or parents also be entitled to relief? If the Legislature chooses to allow the judicial branch to make the compensation decision, the Legislature should consider specifically delineating the types of actual damages that are compensable or risk an interpretation that exceeds or differs from legislative intent.

Punitive Damages: Punitive damages are awarded in addition to actual or compensatory damages, and are designed to punish the defendant for conduct committed with malice, moral turpitude, wantonness, willfulness, outrageous aggravation, or reckless indifference to the rights of others.⁷⁸ Punitive damages are not allowed in awards against the state for tort claims,⁷⁹ and are limited by both definition and amount in other civil actions.⁸⁰ In considering whether to allow punitive damages against the state, the

⁷⁵ Maine provides a cap of \$300,000; Massachusetts provides a cap of \$800,000; New Hampshire provides a cap of \$20,000; Oklahoma provides a cap of \$175,000; Tennessee provides a cap of \$1 million.

⁷⁶ New Jersey allows for twice the amount of the claimant's income in the year prior to incarceration of \$20,000 per year of incarceration, whichever is greater; Virginia allows for 90% of Virginia's per capita personal income as reported by the Bureau of Economic Analysis of the U.S. Department of Commerce, for up to 20 years. Florida's per capita personal income as reported by the Bureau in 2004 was \$31,455; 90% of Florida's per capita income would be \$28,309.

⁷⁷ *Mercury Motors Exp. Inc., v. Smith*, 393 So.2d 545 (Fla. 1981).

⁷⁸ 17 Fla. Jur. 2d, Damages 118.

⁷⁹ Section 768.28(5), F.S.

⁸⁰ Section 768.72, F.S., allows punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.73, F.S., limits the sum of punitive damages to three times the amount of compensatory damages or \$500,000, unless the conduct was motivated solely by unreasonable financial gain, in which case punitive damages are limited to four times compensatory damages or \$2 million. If the defendant had a specific intent to harm the claimant, and did in fact cause harm, there is no cap on punitive damages.

Legislature should consider the difference between willful conduct and reasonable outcomes in a justice system that guarantees due process, not perfection.

Attorney's Fees: Current law provides that a defendant in a criminal prosecution who is acquitted or discharged shall not be liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody.⁸¹ However, there is no statutory authority for an acquitted defendant to be awarded attorney's fees. In fact, a prevailing party is not entitled to attorney's fees absent a statutory or contractual basis.⁸² In claim bill matters, attorneys are typically allowed an attorney's fee that does not exceed the 25% statutory fee limit.⁸³ The Legislature may want to consider whether to allow attorney's fees, whether to allow attorney's fees for the underlying determination of innocence and/or the claim for compensation, and whether to allow attorney's fees to other parties (spouses, parents, others who may have paid attorney's fees on behalf of the wrongfully convicted.) A peripheral issue is whether to allow lobbyist's fees if a legislative process is contemplated.

Constitutional Considerations Regarding the Compensation of the Wrongfully Incarcerated

In considering eligibility and compensation schemes for the wrongfully incarcerated, it may be helpful to have an understanding of the constitutional basis upon which such claims may be made.

Procedural Due Process Analysis

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of Article 1, section 9 of the Florida Constitution restricts the government from depriving a person of life, liberty or property without due process of law. Due process rests primarily on the concept of fundamental fairness, and requires at a minimum the right to adequate advance notice and a meaningful right to be heard.⁸⁴ A right to due process does not equate to a right to a perfect trial, nor to a particular outcome.⁸⁵ The United States and the Florida Constitutional due process protections do not prohibit the deprivation of a liberty interest, they prohibit the deprivation without due process.⁸⁶ In his lawsuit against the state, Wilton Dedge is claiming that the state's refusal to conduct DNA testing was a denial of his due process.⁸⁷ The court recently dismissed the claim as prohibited by sovereign immunity without specifically addressing the due process claim.⁸⁸ As Dedge has been exonerated and released,

⁸¹ Section 939.06, F.S.

⁸² *Goldberg v. Watts*, 864 So.2d 59 (Fla. 2nd DCA 2003).

⁸³ Section 768.28(8), F.S., which has been held not to violate the constitutional right to contract by *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984).

⁸⁴ *State v. Smith*, 547 So.2d 131 (Fla. 1989).

⁸⁵ *Lutwak v. U.S.*, 344 U.S. 604, 619 (1953); *Hall v. State*, 420 So.2d 872 (Fla. 1982).

⁸⁶ *Meola v. Department of Corrections*, 732 So.2d 1029 (Fla. 1998).

⁸⁷ *Dedge v. Crosby and State*, Second Judicial Circuit, case no. 37 2005 CA 001807 (filed June, 2005).

⁸⁸ Order Granting Amended Motion to Dismiss, August 29, 2005.

it might have been a moot point as Florida law does not provide a cause of action for monetary damages for the violation of due process rights; the remedy is to afford the due process rights as directed by the court.⁸⁹

Takings Analysis

The Constitutions of both the United States and Florida prohibit the taking of private property for public use without just compensation. The Takings Clause of the Fifth Amendment to the U.S. Constitution and Article I, section 9 of the Florida Constitution read identically: “No personshall be deprived of life, liberty, or property without due process of law...” The Fifth Amendment of the U.S. Constitution goes on to say, and Article X, section 6 of the Florida Constitution mirrors: “No private property shall be taken without full/just compensation.”⁹⁰

In regards to compensating the wrongfully incarcerated, the constitutional takings argument requires the court to accept the novel argument that a person’s liberty should be equated with the value of their labor, a property interest which if taken by the government would entitle them to compensation.

Both the United States and the Florida Supreme Courts have recognized a protected due process interest in labor,⁹¹ but neither court has extended or equated that right with property in a takings analysis. Courts in nine states, however, have held that a government appropriation of labor requires compensation under the state or federal takings clauses.⁹² Generally at issue in these nine states was the compensation of lawyers who provided compulsory services to indigent defendants. Such a basis for compensation has not been recognized in Florida, though Wilton Dedge has made the argument in his recent petition for relief to the Eighteenth Judicial Circuit.⁹³

Should a Florida court find the takings analysis persuasive, there are several issues which are notable in a policy discussion regarding the compensation of the wrongfully incarcerated:

- ☐ The determination of both public use and just compensation is a uniquely judicial function. The Legislature cannot determine compensation for a taking.⁹⁴
- ☐ The Legislature may declare its policy regarding compensation, and while not conclusive nor binding, it is persuasive and will be upheld unless clearly contrary to the judicial view of the matter.⁹⁵

⁸⁹ Should the Legislature pass legislation, it might want to consider requiring the successful claimant to dismiss pending legislation with prejudice and to release any liability of the government in order to avoid having to pay twice: once by enactment of legislation, and again by order of the court.

⁹⁰ The Fifth Amendment to the U.S. Constitution requires “just” compensation; Article X, section 6 of the Florida Constitution requires “full” compensation.

⁹¹ *Josua v. City of Gainesville*, 768 So.2d 432 (Fla. 2000) (holding the public employment is a constitutionally protected property interest); *Gilbert v. Homar*, 520 U.S. 924 (1997).

⁹² “Revisiting the Takings Based Argument for Compensating the Wrongfully Convicted”, Howard Master, 60 NYU Ann.Surv. Am. L. 97 (March 2004). Master’s article lists the following states that have held that governmental appropriations of labor were protected by the takings clause: Alaska; Arkansas; Indiana; Kansas; Kentucky; Iowa; Missouri; Oklahoma; and Utah.

⁹³ *State of Florida v. Wilton Dedge*, case no. 82-135-CF-A and *Wilton Dedge v. James Crosby, Jr. and State*, case no. 05-20-05-CA-007583; Petition for Expungement of Record, Factual Findings and other Relief Including Actions for Declaratory Relief and Damages and Equitable Relief under Extraordinary Writ Authority, filed in the Second Judicial Circuit of Florida, June, 2005. The court granted the State’s Amended Motion to Dismiss on August 29, 2005.

⁹⁴ *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959).

⁹⁵ *Daniels v. State Road Dept.*, 170 So.2d 846 (Fla. 1964).

- ❑ Constitutional compensation consists of two elements: the value of the property taken, and severance damages to the remainder.⁹⁶
- ❑ “Full compensation” may include the payment of attorney’s fees, costs, and costs of experts necessary to enforce the claimant’s rights.⁹⁷
- ❑ The state cannot assert sovereign immunity as a defense for the violation of a constitutional right,⁹⁸ particularly in cases of inverse condemnation.⁹⁹

Conclusion

The issue of compensating the wrongfully incarcerated will highlight the intersection of the Legislative and Judicial branches of government simultaneously addressing a pressing legal and moral issue. It would appear that the initial question is whether to approach the issue as a moral obligation or as a legal obligation. If approached as a moral obligation, the Legislature might consider a formulaic compensation scheme to be made by the Legislature itself, or by an independent or executive body. Approached as a moral obligation, the Legislature can choose whether or not to waive sovereign immunity, and can provide holistic benefits. A moral obligation acknowledges that a wrong was committed and that the claimant should be compensated, without the need to recognize any particular constitutional violation or create a new entitlement to constitutional protection.

If, on the other hand, the Legislature approaches the issue as a legal obligation, then it would appear that the judiciary branch should be involved in determining eligibility and the amount of compensation with stringent guidelines provided by the Legislature. Such an approach acknowledges that a particular constitutional right has been violated and provides compensation therefor. The legalistic approach may also create new constitutional protections and entitlements.

In weighing the policy options posed by the Wilton Dedge case, two things seem clear: 1) no amount of compensation can make whole an innocent person who was convicted of a crime and who spent years in prison; and 2) our criminal justice system is not perfect. A mistake, while tragic, may not rise to the level of a constitutional violation resulting in the creation of a new constitutional entitlement, but does give the Legislature, as the policy-making branch of the government, the unique authority and the opportunity to enact legislation that recognizes the obligation to compensate the wrongfully incarcerated.

⁹⁶ Broward County v. Carney, 586 So.2d 425 (Fla. 4th DCA 1991).

⁹⁷ Schick v. Fla. Dept. of Agriculture and Consumer Services, 586 So.2d 452 (Fla. 1st DCA 1991); Dade County v. Brigham, 47 So.2d 602 (Fla. 1950).

⁹⁸ State Road Dept. v. Tharp, 1 So.2d 868 (Fla. 1941).

⁹⁹ Pinellas County v. Brown, 420 So.2d 308 (Fla. 2nd DCA 1982).

Appendix A

Compensating the Wrongfully Incarcerated: Unresolved Legislative Issues -- 2005

Issue		House	Senate
Eligibility			
	Must the imprisonment be solely on the basis of the conviction for the offense that was not committed?	Yes	N/A
	Can the person, by his or her own misconduct or neglect, have brought about the prosecution?	No	N/A
	Can the person's acts otherwise constitute a crime?	No	N/A
	Can the person be incarcerated for a lesser included offense?	No	N/A
	Can the person have aided, abetted, or acted as an accomplice to the person who committed the offense?	N/A	No
Innocence	Must the court issue an order vacating, releasing, or reversing the conviction?	Yes	N/A
	Must the court issue an order releasing the claimant?	N/A	Yes
	Must the court order that no further proceedings can or will be held against the person on any facts and circumstances alleged in the proceedings which resulted in the conviction?	Yes	N/A
Time Limit	May request compensation two years after the order vacating, reversing, or dismissing the sentence	Yes	N/A
	May request compensation for any release from incarceration based on exonerating evidence on or after October 1, 2001; must apply within 2 years of the release order or by July 1, 2007, whichever is sooner.	N/A	Yes

Issue		House	Senate
Non-monetary compensation	Should compensation include holistic benefits such as access to mental and health care coverage, educational assistance, job preference, and waiver of expunction fees?	Yes	N/A
	Should the Legislation include provision for an official apology?	Yes	N/A
Monetary compensation	Should damages be capped?	No	\$5 million
	Should types of damages be enumerated?	No	Yes
	Should compensation be allowed for pain and suffering, humiliation, loss of consortium, or emotional distress	N/A	No
	Amount of compensation determined by Legislature or Court?	Legislature	Court
	Should collateral sources of payment be taken into account?	Yes	N/A
Organization	Treated by the Legislature, similar to a claim bill	X	
	Handled by the Attorney General's Office		X
	Required to offer a settlement?	N/A	Yes
Attorney's and Lobbyist's fees	Should attorney's and lobbyist's fees be limited to 25% of the award?	Yes	No
	Should attorney's fees be payable for work performed to determine innocence?	No	Yes
	Should attorney's fees paid by family members be compensable?	N/A	Yes
Sovereign immunity	Should sovereign immunity be waived?	No	Yes
	Should the person have to release and waive any and all future claims against the government arising out of the factual situation?	Yes	N/A

APPENDIX B State by State Analysis of Compensation of the Wrongfully Convicted								
STATE	STATUTE	CONDITIONS PRECEDENT (BESIDES IMPRISONMENT FOR UNJUST CONVICTION)	STANDARD OF PROOF	WHO DECIDES	TIME LIMITS FOR FILING	MAXIMUM AWARDS	WHEN PASSED	CONTRIBUTORY
FEDERAL	28 USC § 1495 & § 2513	Pardon for innocence, or conviction reversed or set aside on ground that claimant is not guilty & found not guilty at new trial or rehearing	not specified	U.S. Court of Federal Claims	N/a	<u>\$100,000 per year for death sentences and \$50,000 per year for all other sentences</u>	1948	Claimant did not commit acts charged & did not by misconduct or neglect cause prosecution
AL	Al Stat § 29-2-150 to § 29-2-165	Conviction vacated or reversed & the charges dismissed on grounds consistent with innocence	not specified	State Division of Risk Management & the Committee on Compensation for Wrongful Incarceration	2 years after exoneration or dismissal	minimum of \$50,000 for each year incarcerated, but Committee can recommend a greater award to the legislature	2001	nothing specified
CA	Cal Pen Code §§ 4900 to 4906	Pardon for innocence or being "innocent"	not specified	State Board of Control makes a recommendation to the legislature	6 months after acquittal, pardon, or release & 4 months before new legislative meeting	\$100 per day of incarceration	Amend 8/28/00	claimant must show he did not contribute to arrest or conviction

DC	DC Code § 2-421	Pardon for innocence or conviction reversed or set aside on the grounds that claimant is not guilty	Clear & convincing	Civil Court	available to any person released after 1979	no maximum; No punitive damages	1981	Claimant must show that he did not commit any of the acts charged, or that his acts constituted no crime & that he did not, by his misconduct, bring about the prosecution, & he must not have pled guilty
IL	Ill Rev Stat ch. 705 § 505/8	Pardon for innocence	Preponderance of the evidence	Court of Claims	N/a	< 5 yrs., 15k max; ≤ 14 yrs., 30k max; >14 yrs., 35 max with COLA increase for each year since 1945	1945	nothing specified
IA	Iowa Code § 663A.1	Conviction vacated or reversed & the charges dismissed	Clear & convincing	District Court for Liability; State Appeal Board or Civil Ct. for damages	2 years	\$50 per day & lost wages up to \$25,000/ yr & attorney's fees	1997	claimant must not have plead guilty
LA	R.S. 15:572.8	Conviction reversed or vacated & applicant proven by clear & convincing scientific or non-scientific evidence that he is factually innocent	Clear & convincing	Nineteenth Judicial District Court	2 years	\$15,000/yr not to exceed \$150,000 plus job-skills training for 1 yr; pay appropriate medical & counseling for 3 yrs; & tuition & fees at community college or public university	2005	nothing specified

ME	14 Me Rev Stat 8241 to 8244	Pardon for innocence	Clear & convincing	Superior Court	2 years from pardon	300K, no punitive damages	1993	nothing specified
MD	Md State Fin & Proc § 10-501	Pardon on the ground that conviction was in error	"conclusive"	Board of Public Works	not specified	actual damages	1963	nothing specified
MA	Ma ch. 258D §§ 1 to 9	Pardon for innocence, or conviction reversed & either charges dismissed or acquittal on retrial	Clear & convincing	Superior Court	2 years from pardon or grant of judicial relief	800K	2004	claimant did not commit acts charged in the accusatory instrument, or his acts did not constitute a crime, & he must not have pled guilty
MT	Mont Code § 53-1-214	Conviction overturned by a court based on DNA testing		Funds to be appropriated by the legislature	not specified	Provides educational aid to wrongfully convicted persons exonerated by post-conviction DNA testing	2003	nothing specified
NH	NH Stat § 541-B:14	"Found Innocent"	Board must find by majority vote that claim is "justified"	Board of Claims	3 years	20K cap	1977	nothing specified

NJ	NJ Stat 52:4C-1 to 4C-6	None	Clear & convincing	Superior Court	2 years from release or pardon	Twice the amount of claimant's income in the year prior to incarceration or 20K per year of incarceration, whichever is greater	1997	claimant did not by his own conduct cause or bring about conviction
NY	NY Ct of Claims Act § 8-b	Pardon or conviction reversed & charges dismissed on grounds consistent with innocence or case tried to acquittal	Clear & convincing	Court of Claims	2 years	no limit	1984	claimant did not commit acts charged in the accusatory instrument or his acts did not constitute a crime
NC	NC Gen Stat §§ 148-82 to 148-84	Pardon for innocence	not specified	Industrial Commission makes a recommendation to the governor	5 years	10K/yr, max of \$150,000	1947	nothing specified
OH	Ohio Rev Code § 2305.02 & § 2743.48	Conviction vacated or reversed & charges dismissed	Preponderance of the evidence	Court of Common Pleas for liability; Court for Claims for damages	2 years	25K/yr & lost wages, costs, & attorney's fees	1986; amended	claimant must not have pled guilty

OK	Ok Stat §51-154	Conviction vacated & charges dismissed, or pardoned, & in either case, upon a finding that the claimant did not commit the crime for which he or she had been convicted	Clear & convincing	State Civil Court	no time limit	\$175,000 (no punitive damages)	2004	claimant must not have pled guilty, & must have been imprisoned solely as a result of the wrongful conviction
TN	Tenn Code § 9-8-108	"exoneration" or pardoned for innocence	not specified	Board of Claims	1 year	\$1,000,000.00	1984; amended	nothing specified
TX	Tex Code §§ 103.001 to 103.002 & §§ 103.051-103.052	Pardon or has been granted relief on the basis of innocence	Preponderance of the evidence	May file administrative claim with comptroller or civil suit but not both	2 years release from custody or discovery of evidence substantiating claim	25K/yr to a max of \$500,000	amended 2001	claimant must not have pled guilty

VA	8.01-195.10 & 19.2-327.1	Conviction vacated pursuant to VA Code Cptr 19.2-327.2 et seq.	not specified	General Assembly	not specified	90% of VA per capita personal income as reported by the Bureau of Economic Analysis of the U.S. Dept of Commerce - for up to 20 yrs. Additionally, an award of tuition worth \$10,000 in VA Comm. College system may be made	2004	claimant must not have pled guilty - unless he or she was charged with a capital offense. If the claimant should subsequently be convicted of a felony, he or she becomes ineligible to receive further payments owed. Finally, acceptance of the award precludes filing any further or additional claims against the state for conduct arising out of the factual situation in connection with the conviction
WV	W. Va Code § 14-2-13(a)	Pardon for innocence, or conviction reversed & either charges dismissed or acquittal on retrial	Clear & convincing	Court of Claims	2 years after pardon or dismissal	fair & reasonable damages	1987	claimant did not contribute or bring about conviction
WI	Wis Stat § 775.05	None Specified	Clear & convincing	Claims Board	not specified	5K/yr, max 25K but Board may petition legislature for additional funds	1913	claimant did not contribute or bring about conviction

The information in this chart summarizes the statutes discussed in Adele Bernhard's article *When Justice Fails*, 6 U Chi L Sch Roundtable 73, as provided by the Innocence Project & updated by the Florida House of Representatives Claims Committee Staff, July, 2005.